

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

DEMONDRAY D. MAYO,  
Petitioner,  
vs.  
STATE OF NEVADA, *et al.*,  
Respondents.

3:09-cv-00316-ECR-RAM

**ORDER**

This is an action on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by petitioner appearing through counsel. Before the Court is respondents' Motion to Dismiss (ECF No. 22), petitioner's Response in Opposition to the Motion to Dismiss (ECF No. 30), his Motion for Stay of Proceedings (ECF No. 31), respondents' Reply, including an opposition to the Motion to Stay (ECF No. 32), and petitioner's Reply to Opposition to Motion for Stay (ECF No. 37). The motions are now ready for review and decision as discussed below.

**I. Procedural History**

A. Criminal Proceedings

Following preliminary hearings, petitioner was charged by way of an Information filed on December 14, 2005, with Murder with the Use of a Deadly Weapon, Conspiracy to Commit

1 Robbery, Attempt Robbery with the Use of a Deadly Weapon, and Battery with Intent to Commit a  
2 Crime. Exhibit 17.<sup>1</sup>

3 Petitioner originally pleaded not guilty to the charges at arraignment in district court  
4 on December 27, 2005. Exhibit 2. Shortly thereafter, petitioner made a *pro per* motion to dismiss  
5 his court appointed counsel arguing she had not obtained his medical records or had him evaluated to  
6 determine his competence. Exhibit 18. The motion was withdrawn after petitioner had an  
7 opportunity to discuss the matter with counsel and she arranged for him to meet with a doctor.  
8 Exhibit 2.

9 Petitioner met with a court appointed psychologist numerous times prior to September  
10 6, 2006. Exhibit 8. Petitioner then signed a guilty plea agreement. Exhibit 48. On September 6,  
11 2006, appearing with a temporary substitute counsel, petitioner appeared to enter his guilty plea to a  
12 charge of Second Degree Murder with the Use of a Deadly Weapon. Exhibit 49.

13 Counsel filed a sentencing memorandum on September 13, 2006. Exhibit 50. On  
14 October 11, 2006, counsel filed petitioner's handwritten motion to withdraw guilty plea. Exhibit 52.  
15 At a hearing on the motion, the Special Public Defender's office was withdrawn as counsel. Exhibit  
16 2, p. 5. On October 30, 2006 new counsel was confirmed and the hearing on the motion to withdraw  
17 plea was continued to a later date to allow counsel to file necessary additional briefing. *Id.*, p. 6.  
18 Counsel's Motion to Withdraw Guilty Plea was filed on March 5, 2007. Exhibit 60. A hearing on  
19 the motion was conducted on April 2, 2007 and the motion was denied. Exhibit 63. No appeal of  
20 the order was filed.

21 Judge Togliatti sentenced petitioner on April 17, 2007, to a term of life in prison with  
22 the possibility of parole after ten years and an identical second consecutive term for the deadly  
23 weapon enhancement. Exhibit 64. Counsel informed the court to petitioner's desire to appeal and  
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25 <sup>1</sup> The exhibits referenced in this order were submitted by petitioner in support of his amended  
26 petition and are found in the Court's docket at ECF Nos. 18-20 and 38.

1 counsel's appointment was continued for that purpose. *Id.* The Judgment of Conviction was filed  
2 on April 24, 2007. Exhibit 65. No direct appeal was pursued.

**B. Motion to Correct Illegal Sentence/Withdraw Guilty Plea**

4 On November 9, 2007, counsel for petitioner filed a “Motion for Correction of Illegal  
5 Sentence, Alternatively Motion to Withdraw Guilty Plea.” Exhibit 66. The motion argued petitioner  
6 received ineffective assistance of counsel where counsel failed to wait until the legislature decided  
7 the deadly weapon law, and that petitioner should have been eligible to receive the benefit of the new  
8 law under the due process guarantees of the Fifth Amendment. *Id.* The motion was denied on  
9 January 16, 2008. Exhibit 70. Petitioner appealed this decision. Exhibit 71. The Nevada Supreme  
10 Court affirmed the lower court on January 30, 2009. Exhibit 85. Remittitur issued on February 24,  
11 2009. Exhibit 87.

**C. State Post-Conviction Petition**

13 Petitioner filed a pro se petition for writ of habeas corpus, post-conviction on June 11,  
14 2009, raising two grounds for relief. Exhibit 90. An order to respond to the petition was entered on  
15 June 20, 2009. Exhibit 92. A response and Motion to Dismiss the petition was filed on July 1, 2009,  
16 and a hearing was set for September 2, 2009. Exhibits 94 and 99. The hearing was later vacated  
17 and, while no ruling on the motion to dismiss has been entered, the court's docket indicates the  
18 matter is closed. *Id.*

19 Counsel for petitioner advises that he has made an appearance in the state court  
20 proceedings and sought to supplement the petition. Amended Petition, p. 6, lines 7-8.<sup>2</sup>

D. Federal Habeas Petition

Petitioner's habeas petition was signed and submitted for mailing to prison officials on or about May 25, 2009, and was filed with the Court on April 23, 2010, after the issue of the

<sup>2</sup> Petitioner advised the state court has set a hearing in the post-conviction proceeding for mid-July, 2011.

1 filing fee was resolved. (ECF No. 4.) Counsel was appointed to represent petitioner and an  
2 amended petition was filed on December 8, 2010. (ECF No. 17.) The amended petition raises four  
3 grounds for relief as follows:

- 4 I. Mayo was denied his Fifth Amendment due process right to  
5 individualized sentencing when a mandatory doubling of his second  
degree murder life sentence was imposed under Nev. Rev. Stat.  
§193.165 as an enhancement for use of a deadly weapon.
- 6 II. Mayo was denied his Sixth and Fourteenth Amendment right to the  
7 effective assistance of counsel when counsel (1) failed to object to a  
8 mandatory deadly weapon sentencing enhancement that doubled his  
life sentence and (2) failed to appeal the imposition of such  
sentence.
- 9 III. Mayo's guilty plea to the amended information was involuntary in  
10 violation of his Fifth and Fourteenth Amendment right to due  
process of law because of (1) the intellectual deficits and emotional  
instability from which he suffered at the time of the plea, (2) the  
impact of prescribed medications on his intellectual functioning, (3)  
the trial court's failure to accommodate his intellectual limitations  
during the plea canvass and (4) the trial court's failure at the plea  
canvass to explain the elements of the crimes charged.
- 14 IV. Mayo was denied his Sixth and Fourteenth Amendment right to the  
15 effective assistance of counsel when counsel urged May to execute  
16 a written plea agreement exposing him, then 17 years old, to  
consecutive life sentences, while (1) not thoroughly investigating a  
possible defense based on Mayo's severe intellectual deficits and  
emotional instability; (2) not adequately explaining the agreement  
and Mayo's alternatives, (3) incorrectly certifying that Mayo was  
not under the influence of drugs and (4) appearing for Mayo at the  
plea hearing and seeking the plea's approval without (a) presenting  
pertinent medical and educational records highlighting Mayo's  
severe intellectual deficits and emotional instability at the time of  
his plea and requesting accommodations for such disabilities at the  
plea canvass and (b) informing the court of the anti-psychotic and  
antidepressant medications Mayo was taking at the time of the plea.

21  
22 *Id.*

23 Respondents have filed a Motion to Dismiss the petition and petitioner opposes the  
24 motion and seeks a stay of the proceedings to permit him to complete the still pending state post-  
conviction proceedings. The respondents' Motion to Dismiss is based on various grounds, arguing  
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1 the petition is untimely, the grounds are unexhausted, and certain grounds are procedurally defaulted.  
2 In the interests of judicial economy and fairness, the motion to dismiss will be denied and a stay  
3 granted as discussed herein.

4 **II. Discussion**

5 A. Timeliness

6 Respondents move to dismiss the petition on grounds of untimeliness. The substance  
7 of the argument is anticipatory in nature in that respondent “believe” the state court will dismiss the  
8 still pending state post-conviction petition as untimely because it was not filed until June 11, 2009,  
9 where the judgment of conviction became final on May 24, 2007, thirty days after entry of judgment  
10 where no appeal was sought. *See Exhibit 65.*

11 A federal petition must be filed within one year of the date that his conviction  
12 becomes final. 28 U.S.C. § 2244(d). The one year limitation period is tolled while a “properly filed  
13 application for State post-conviction or other collateral review with respect to the pertinent judgment  
14 or claims is pending.” *Id.*, subpart (2). A “properly filed application” is one in which the “delivery  
15 and acceptance are in compliance with the applicable laws and rules governing filings.” *Dictado v.*  
16 *Ducharme*, 244 F.3d 724, 726-27 (9th Cir. 2001), quoting *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct.  
17 361, 364 (2000). In this instance, petitioner filed a motion to correct an illegal sentence or  
18 alternatively to withdraw his guilty plea on November 9, 2007, within the one-year period. That  
19 motion was denied and the appeal concluded on February 24, 2009. Exhibit 87. Petitioner then filed  
20 a state post-conviction petition on June 11, 2009. Exhibit 90. The federal action was commenced on  
21 June 15, 2009 (ECF No. 1). As a result, assuming these collateral attacks were properly filed,  
22 petitioner used 276 days of his one-year period.

23 Respondents acknowledge that the original petition filed in this action was “probably”  
24 filed within the one-year limitations period, but argue that the amended petition filed by counsel in  
25 December, was untimely, because it was filed more than a year after the original petition was filed.

This contention is unpersuasive in light of the fact that the state post-conviction petition is still pending in the state court where such proceedings toll the statute. Because no determination has yet been made by the state court as to whether the petition is considered properly filed or not, for purposes of this order, the Court assumes that the state petition has tolled the statute of limitation. Therefore, the amended federal petition was not untimely.

#### B. Exhaustion and Motion for Stay

7 Next, respondents argue the petition must be dismissed as it contains no exhausted  
8 claims. Petitioner opposes dismissal arguing that grounds three and four of the amended petition  
9 were exhausted in state court during litigation of the motion to correct an illegal sentence or  
10 alternatively to withdraw the guilty plea. Additionally and by separate motion, petitioner seeks a  
11 stay of the action to permit the parallel state proceedings to conclude under a theory of judicial  
12 comity or under *Rhines v. Weber*, 544 U.S. 269 (2005), depending on the Court’s finding as to the  
13 exhaustion of any grounds for relief.

14 A federal court will not grant a state prisoner's petition for habeas relief until the  
15 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S.  
16 509 (1982); 28 U.S.C. § 2254(b).<sup>3</sup> State remedies have not been exhausted unless the claim has been  
17 fairly presented to the state courts. *Kelly v. Small* 315 F.3d 1063, 1066 (9<sup>th</sup> Cir. 2003). To fairly

<sup>3</sup> 28 U.S.C. § 2254(b) states, in pertinent part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that: (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available state corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

\* \* \*

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

1 present a federal claim to the state court, the petitioner must alert the court to the fact that he asserts  
 2 a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999),  
 3 *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66. A claim presented in a  
 4 procedural context that does not allow for a review of the claim on its merits, absent special  
 5 circumstances, is not exhausted. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

6 Petitioner raised the claim that he should be permitted to withdraw his guilty plea  
 7 because it was not voluntary or knowing based on his intellectual and mental disabilities and on  
 8 counsel's failure to fully advise petitioner about the consequences of his guilty plea before both the  
 9 state trial court and the state supreme court. *See Exhibits 52, 66 and 83*. Specifics as to petitioner's  
 10 educational history were presented to the Nevada Supreme Court on appeal. Exhibit 83. Petitioner  
 11 further alleged that counsel had failed to "address with the court the reasonable concerns that it  
 12 would have had regarding Mr. Mayo's IQ level in comprehending his guilty plea." *Id.*, p. 8-9. The  
 13 opening brief presented significant more detail in support of the claim, but did not alter the substance  
 14 or meaning of the claim. *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986); *Humphrey v. Cady*, 405 U.S.  
 15 504, 516 n. 18 (1972). Thus, it appears that petitioner presented the substance of subparts (1) and (4)  
 16 of ground three and ground 4 of his first amended federal petition to the state courts in litigating the  
 17 motion to correct an illegal sentence.

18 In denying relief, the Nevada Supreme Court inexplicably addressed only the pre-  
 19 sentence motion to withdraw guilty plea finding that it was procedurally defaulted because petitioner  
 20 did not appeal the denial of that motion in a direct appeal of his conviction. Exhibit 85. The Nevada  
 21 Supreme Court's failure to address the post-sentence motion to withdraw guilty plea which was  
 22 coupled with the motion to correct an illegal sentence does not affect the exhaustion of the claims  
 23 where the procedural bar imposed by the state court does not present adequate or independent  
 24 grounds for denial. *Harmon v. Ryan*, 959 F.2d 1457, 1461 (9<sup>th</sup> Cir. 1992); *Harris v. Reed*, 489 U.S.  
 25 255 (1989).

1                  Here, because the procedural bar was imposed only against the pre-sentence motion to  
 2 withdraw guilty plea, the Court does not find that the procedural bar applies to the grounds presented  
 3 in the post-sentence motion. While the Nevada Supreme Court denied review of petitioner's pre-  
 4 sentence motion to withdraw his guilty plea on the basis of a state procedural requirement, the  
 5 court's failure to consider or address the post-sentence motion which was the motion on appeal is not  
 6 explained, making claims raised in that motion exhausted and not procedurally barred. *Smith v.*  
 7 *Digmon*, 434 U.S. 332, 333-334 (1978) (holding that the fact the state court does not explicitly rule  
 8 on the merits of petitioner's claims is irrelevant, where the state court be given the opportunity to  
 9 consider the claims that have been presented); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir.  
 10 1985); *accord Carter v. Estelle*, 677 F.2d 427 (5th Cir. 1982) and *United States ex rel. Giesler v.*  
 11 *Walters*, 510 F.2d 887, 892 (3d Cir. 1975).

12                As to grounds one and two, petitioner does not argue that these claims are exhausted  
 13 and, in fact, asserts that they are currently pending in state court. Petitioner presents a mixed petition  
 14 which cannot proceed in its current iteration. As a result, the Court concludes that the motion for  
 15 stay is not premature and the mixed petition presented here is subject to stay and abeyance, if  
 16 petitioner is able to meet the requirements of *Rhines v. Weber* to show good cause of the delay and  
 17 that the unexhausted claims are not clearly meritless. *Id.*,

18                The Rhines Court stated:

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 20                [S]tay and abeyance should be available only in limited  
 21 circumstances. Because granting a stay effectively excuses a  
 22 petitioner's failure to present his claims first to the state courts, stay  
 23 and abeyance is only appropriate when the district court determines  
 24 there was good cause for the petitioner's failure to exhaust his  
 25 claims first in state court. Moreover, even if a petitioner had good  
 cause for that failure, the district court would abuse its discretion if  
 it were to grant him a stay when his unexhausted claims are plainly  
 meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ  
 of habeas corpus may be denied on the merits, notwithstanding the  
 failure of the applicant to exhaust the remedies available in the  
 courts of the State").

1 Rhines, 544 U.S. at 277.

2 According to the procedural history, petitioner's state post-conviction petition was set  
3 for a hearing in September of 2009, but when the hearing was vacated, no further action was taken  
4 by the court and the case was marked as closed. Exhibit 99. In fact, it does not appear that petitioner  
5 was in any way responsible for the hearing not going forward as originally scheduled. For this  
6 reason, petitioner asserts that he was reasonably confused about the need to file his federal habeas  
7 petition where the state post-conviction petition was never heard and where his prior experience with  
8 the assistance of counsel for purposes of filing a direct appeal resulted in no direct appeal being filed.  
9 Furthermore, once the motion to correct an illegal sentence or to withdraw the guilty plea had been  
10 decided by the state courts, his appointed counsel did nothing further on petitioner's behalf.

11 Reasonable confusion about the need for filing in state court has been found to  
12 constitute good cause for a premature filing of the federal petition. *See Pace v. DiGuglielmo*, 544  
13 U.S. 408, 416 (2005). Considering the evidence in the record of petitioner's lower than average  
14 intellectual functioning and his emotional or psychological problems, confusion as to when or how a  
15 federal petition should be pursued is not unlikely. Thus, the Court finds that petitioner has shown  
16 good cause of the improvident or premature filing of his federal petition.

17 His unexhausted claims appear to raise issues that, if found to be true could merit  
18 relief. The issues related to the change in the law of the mandatory deadly weapon enhancement is  
19 not extremely strong, although the Court cannot say they are meritless. However questions about the  
20 effective assistance of counsel in the guilty plea agreement and proceedings derived from the  
21 agreement warrant review by the Court.

22 **IV. Conclusion**

23 Based on the foregoing, the Court finds that petitioner has exhausted ground 3,  
24 subparts (1) and (4) and ground four of the first amended petition. Grounds one and two remain  
25 unexhausted. Moreover, petitioner's still pending state post-conviction petition must be allowed to

1 proceed to completion before this Court considers the merits of his claims. *Picard v. Connor*, 404  
2 U.S. 270, 275 (1971). The motion to dismiss will be denied and the motion for stay will be granted.

3                   **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (ECF No.  
4 22) is **DENIED**.

5                   **IT IS FURTHER ORDERED** that petitioner's motion for issuance of stay and  
6 abeyance order (ECF No. 31) is **GRANTED**.

7                   **IT IS FURTHER ORDERED** that this action is **STAYED** pending exhaustion of  
8 the unexhausted claim. Petitioner may move to reopen the matter following exhaustion of the claim.

9                   **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner  
10 completing litigation of his now pending state post-conviction petition and returning to federal court  
11 with a motion to reopen within forty-five (45) days of issuance of the remittitur by the Supreme  
12 Court of Nevada at the conclusion of the state court proceedings.

13                   **IT IS FURTHER ORDERED** that the Clerk shall **ADMINISTRATIVELY**  
14 **CLOSE** this action, until such time as the Court grants a motion to reopen the matter.

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16                   Dated this 20<sup>th</sup> day of June, 2011.

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19                   UNITED STATES DISTRICT JUDGE

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